Lim Hong Siang v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 41–15 OF 2007
ZAMANI A RAHIM JC
29 APRIL 2008

Criminal Procedure — Charge — Defective charge — Error or omission in charge — Statement of facts inconsistent with charge — Whether material — Whether appellant misled by error or omission – Whether appellant understood charge — Whether appellant understood nature and consequences of his plea of guilt

Criminal Procedure — Sentence — Appeal, against — Whether appellate court may alter sentence — Whether sentence passed by lower court manifestly excessive or inadequate — Whether lower court erred in principle warranting intervention of appellate court

The magistrate's court convicted the appellant who had pleaded guilty to the charge of retaining stolen property namely, five units of various brands of handphones belonging to one Fong Chew Phein, an offence under s 411 of the Penal Code ('Code'). According to the statement of facts, a police officer ('complainant') who was on duty at Pusat Kawalan, Ibu Pejabat Daerah Kota Setar received a phone call from one Poh Ken Hua informing him, inter alia, that an armed robbery had occurred at his shop at Lorong Merpati, Alor Star. In the said armed robbery, a cash of RM100, a lap top and a handset were reported stolen. However, there was no mention in the statement of facts that the said Poh Ken Hua had reported a loss of five units of various brands of handphones during the aforesaid armed robbery. Neither did the facts mention that subsequent police investigations revealed that the said handphones were identified and reported stolen in the said robbery. He pleaded guilty and understood the nature and consequences of his plea. The magistrate's court accepted the plea of guilt of the accused and convicted him. In mitigation, the accused requested that he be imposed with a fine only. The prosecutor, on the other hand, requested for deterrent sentence. The accused was sentenced to three months imprisonment. Dissatisfied with the sentence, the accused had filed an appeal against the sentence. The application by the accused for stay of the custodial sentence was granted by the magistrate, after having served 29 days in prison.

Held, setting aside plea of guilt, remitting case to the magistrate's court for retrial:

(1) The prosecution was required to prove one of the essential ingredients of the offence under s 411 namely, the property was a stolen property. In this case, no evidence was led during the proceedings to show that the said handphones belonged to Poh Ken Hua. The charge however, stated that the said handphones belonged to Fong Chew Phein. The facts made no mention in what way he or she was relevant to this case (see paras 11–12).

(2) The allegation that the accused had committed the armed robbery was also not covered by the charge. No charge under ss 392 and 397 of the Code was preferred against him. That being the case, such allegation was inadmissible, prejudicial against the accused and ought to be excluded, though not challenged by him (see para 15).

(3) The learned magistrate was duty bound to verify the facts of the case with the charge to ensure that the facts were supportive of the charge and having done so, to expunge all inadmissible, irrelevant and highly prejudicial evidence against the accused. The magistrate must carry out the task fairly, more so in this case, the accused was unrepresented — he had not had the services of counsel at the time he entered the plea of guilt at the court below (see para 16).

(4) It is axiomatic that the statement of facts should be concise and unambiguous. It should contain relevant facts which go to support the elements of the charge. The facts or evidence which are irrelevant, inadmissible and gravely prejudicial to the accused should be discarded. It is of fundamental importance to the administration of criminal justice that the accused should be given a fair trial or proceeding (see para 17).

[Bahasa Malaysia summary

Mahkamah majistret telah mensabitkan perayu yang telah mengaku salah terhadap pertuduhan memiliki barangan curi iaitu telefon bimbit pelbagai jenama kepunyaan seseorang yang bernama Fong Chew Phein, satu kesalahan di bawah s 411 Kanun Keseksaan ('Kanun'). Berdasarkan pernyataan fakta, pegawai polis ('pengadu') yang sedang bertugas di Pusat Kawalan, Ibu Pejabat Daerah Kota Setar menerima panggilan telefon daripada seseorang yang bernama Poh Ken Hua memaklumkannya, antara lain, berlaku satu rompakan bersenjata di kedainya di Lorong Merpati, Alor Star. Dalam rompakan bersenjata tersebut, wang tunai sebanyak RM100, sebuah komputer riba dan sebuah telefon bimbit dilaporkan telah dicuri. Walau bagaimanapun, tidak disebutkan dalam pernyataan fakta bahawa seseorang

bernama Poh Ken Hua melaporkan kehilangan lima unit telefon bimbit pelbagai jenama semasa rompakan bersenjata yang disebutkan. Beliau telah mengaku salah dan faham dengan akibat pengakuannya. Mahkamah majistret menerima pengakuan bersalah tertuduh dan telah mensabitkannya. Dalam mengurangkan hukuman, tertuduh memohon agar beliau dikenakan denda sahaja. Pada masa yang sama, pihak pendakwaan memohon hukuman bersifat pencegahan. Tertuduh telah dihukum tiga bulan penjara. Tidak berpuas hati dengan hukuman tersebut, tertuduh memfailkan rayuan terhadap hukuman. Permohonan oleh tertuduh bagi penangguhan hukuman penjara telah dibenarkan oleh mahkamah, selepas dipenjarakan selama 29 hari.

Diputuskan, mengetepikan pengakuan bersalah, mengembalikan kes ke mahkamah majistret untuk perbicaraan semula:

(1) Pihak pendakwaan dikehendaki membuktikan satu unsur penting bagi kesalahan di bawah s 411 iaitu, barangan tersebut adalah barangan yang telah dicuri. Dalam kes ini, tiada keterangan dikemukakan untuk menunjukkan bahawa telefon-telefon bimbit tersebut adalah kepunyaan Poh Ken Hua. Walau bagaimanapun pertuduhan tersebut, menyatakan bahawa telefon-telefon bimbit tersebut adalah kepunyaan Fong Chew Phein. Fakta-fakta yang dibuat tidak menyebut dalam keadaan apa yang dia berkait dengan kes ini (lihat perenggan 11–12).

(2) Dakwaan bahawa tertuduh telah melakukan rompakan bersenjata juga tidak dirangkumi oleh pertuduhan. Tiada pertuduhan di bawah ss 392 dan 397 Kanun dikenakan terhadapnya. Oleh sebab itu, dakwaan tersebut adalah tidak boleh diterima, memprejudiskan tertuduh dan boleh dikecualikan, walaupun tidak dicabar oleh beliau (lihat perenggan 15).

(3) Adalah menjadi tugas majistret yang terpelajar untuk menentusahkan fakta-fakta kes bagi memastikan fakta-fakta menyokong pertuduhan dan setelah berbuat sedemikian, membuang kesemua keterangan yang tidak boleh diterima, tidak relevan dan keterangan yang begitu memprejudiskan tertuduh. Majistret mestilah menjalankan tugasnya dengan adil, terutama dalam kes ini, tertuduh tidak diwakili — beliau tidak mendapat khidmat peguambela semasa beliau memasukkan pengakuan bersalah di mahkamah bawahan (lihat perenggan 16).

(4) Adalah tidak dapat disangkal bahawa penyataan fakta seharusnya padat dan jelas. Ia sepatutnya mengandungi fakta-fakta relevan yang mampu menyokong asas pertuduhan. Fakta-fakta atau bukti yang tidak relevan, tidak boleh diterima dan sangat memprejudiskan tertuduh haruslah

A diketepikan. Ia adalah asas yang penting kepada pentadbiran keadilan jenayah bahawa tertuduh harus diberikan perbicaraan atau prosiding yang adil (lihat perenggan 17).]

Notes

B For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.
For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1083–1115.

C **Cases referred to**
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505, SC (refd)
Saludin bin Surif v PP [1997] 3 MLJ 317, CA (refd)

Legislation referred to
D Criminal Procedure Code s 325
Penal Code ss 392, 397, 411

Gooi Hock Seng (Shan & Gooi) for the appellant.
Siti Maslia bt Ibrahim (Deputy Public Prosecutor, State Attorney General's Chambers) for the respondent.

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Zamani A Rahim JC:

F **[1]** This is a simple case. Despite its simplicity, there are flaws in the prosecution case. The flaws herein are common occurrence in the court below. With this judgment, I hope it will serve as a remainder to the prosecution so that similar mistakes may not be repeated.

G **[2]** For the purposes of this appeal, the appellant is hereinafter referred to as the accused. The accused was charged at the Magistrate's Court (2) Alor Star as follows:

THE CHARGE

H Bahawa kamu pada 19.11.05 jam lebih kurang 5.00 petang di dalam kedai JJ Star Trading, No 1406, Taman Sultan Badlishah, Alor Star, di Daerah Kota Star, di dalam negeri Kedah, dengan niat yang curang telah memiliki harta curi iaitu 5 buah telefon bimbit (3 jenis jenama Nokia, 1 jenama Motorola dan 1 jenama Samsung) dengan harga setiap satu lebih kurang RM70 kepunyaan Fong Chew
I Phein, KPT 831003-07-5612, di mana kamu tahu atau ada sebab mempercayai harta itu adalah harta curi. Oleh yang demikian itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 411 Kanun Keseksaan.

[3] The charge was read and explained to the accused. He understood the charge and consequences of his plea. He pleaded guilty thereto. As the accused was unrepresented, it would be desirable that the accused be informed of the range of sentences that can be meted out against him.

FACTS OF CASE

[4] Having pleaded guilty and understood the nature and consequences of his plea, the prosecutor presented the statement of facts of the case. The facts were as follows:

> Pada 19.11.06, jam lebih kurang 1212 hrs, semasa pengadu sedang bertugas sebagai pegawai bertugas di Pusat Kawalan IPD Kota Star telah terima satu panggilan telefon dari seorang lelaki cina nama: Poh Ken Hua, KPT 00503-02-5345 mengatakan kedainya bernama Soji Telekomunikasi, Lorong Merpati, Alor Star telah disamun oleh 2(1)(c) bersenjata pisau dan mengambil (wang tunai RM100, satu lap top dan handset, kedua-dua suspek melarikan diri dengan menaiki m/sikal no pendaftaran tidak dapat dipastikan cuma nombor 873 saja. Ini laporan pengadu.
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> Berpandu suspek 1. Lim Kim Lee, K/P 601002-02-5003 dan Teoh Lai Sieng, K/P 770512-02-6249 bersangkut Alor Star rpt 20388/2006 pada 21.11.06 jam lebih kurang 1800 hrs diketuai Insp Norzila bersama D/SI Maidin, D/L/Kpl Maidin, D/LVKpl 90742, 116407, 118158 telah pergi ke kedai JJ Star Trading, No 1406 Taman Sultan Badlishah, 05050 Alor Star telah memperkenalkan diri pegawai polis kepada satu lelaki cina dan minta kad pengenalan diri dapati nama: Lim Hong Siang, K/P 761211-02-6275, kerja berniaga, alamat: Kg. Charok Padang, 08200, Sik, Kedah @ A-146, Taman Aman, Anak Bukit, Alor Star, Kedah. Dengan diiringi oleh tuan punya kedai telah rampas 5 buah h/phone jenama seperti di bawah dan 5 helai resit belian atas nama Teoh Lai Seng, K/P 770512-02-6249, 4 keping dan atas nama Lim Kim Lee, K/P 601002-02-5003 sekeping dan Nokia 2300 1 buah Nokia 3610 1 buah, Nokia 3100 1 buah, Samsung SGH E 800 1 buah Motorolla C-380 1 buah. Lelaki cina tersebut ditangkap untuk siasatan lanjut bersangkut Alor Star Rpt 20388/2006 satu senarai bongkar telah diserahkan kepada suspek sebab-sebab tangkapan telah diberitahu kepada suspek. Report sebagaimana Alor Star/20564/06.
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> Siasatan lanjut telah dijalankan ke atas lelaki cina yang ditangkap, yang mana telah dicamkan sebagai Yang Kena Tuduh di dalam kes ini dan telah mendapati melakukan satu kesalahan seperti di dalam laporan pengadu.
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> Hasil siasatan telah mendapati Yang Kena Tuduh telah melakukan kesalahan sepertimana di dalam pertuduhan di bawah Seksyen 411 Kanun Keseksaan.

[5] The statement of facts was marked as P1 and the 5 units of handphone which formed the subject matter of the charge were produced and marked as follows:

(1) a Nokia 2300, P2;

A (2) a Nokia 3610, P3;

(3) a Nokia 3100, P4;

(4) a Samsung SGH E 800, P5; and

B (5) a Motorolla C-380, P6.

[6] The accused admitted the facts as being true. The court accordingly accepted the plea of guilty by the accused and convicted him. In mitigation, the accused requested that he be imposed with a fine only. The prosecutor, on C the other hand, requested for deterrent sentence as the cases of this nature were rampant. The sentence was also to serve as a deterrent to the accused and to other like minded persons.

[7] The court sentenced the accused to three months imprisonment with D effect from the date of judgment, that is, 9 January 2007. Dissatisfied with the sentence, the accused had filed, on 18 January 2007, an appeal against the sentence. On 7 February 2007, the accused application for stay of the custodial sentence was granted by the magistrate, after having served 29 days in prison.

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[8] The appeal by the accused was against sentence only.

THE FACTS DISCLOSED DO NOT SUPPORT THE CHARGE

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[9] The accused was charged for an offence of retaining stolen property under s 411 of the Penal Code, to wit, five units of handphone belonging to one Fong Chew Phein at shop known as JJ Star Trading, No 1406, Taman Sultan Badlishah, Alor Star.

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[10] According to the statement of facts, a police officer (complainant) who was on duty at Pusat Kawalan, Ibu Pejabat Daerah, Kota Setar received a phone call from one Poh Ken Hua on 19 November 2006 informing him of an armed robbery occurred at his shop, Soji Telekomunikasi at Lorong H Merpati, Alor Star. In the said armed robbery, a cash of RM100 a lap top and a handset were reported stolen.

[11] There was no mention in the statement of facts that the said Poh Ken Hua had reported a lost of 5 units of various brand of handphones namely, I a Nokia 2300, P2; a Nokia 3610, P3; a Nokia 3100, P4; a Samsung SGH E 800, P5 and a Motorolla C-380, P6 during the aforesaid armed robbery. Neither the facts mentioned that subsequent police investigations revealed that the said handphones were identified and *reported stolen* in the said robbery on 19 November 2006. The need on the prosecution part to prove

one of the essential ingredient of the offence under s 411, that is, *the property is stolen property*, is explained in *Ratanlal & Dhirajlal's Law of Crimes*, 25th Ed, at p 2119, para 16 as follows: A

> The goods received must be the identical goods which were stolen, and not some thing for which they had been sold or exchanged. The finding must be that the accused received the very property stolen, not property like it. If it is manifestly impossible to recognise the stolen property, no conviction can be made. B
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> Where the stolen property consisted of cereals, the fact that the cereals found in the house of a person residing in the same village corresponded with the alleged stolen cereals was held to be no sufficient to establish the identity of the stolen cereals with those found. C

[12] No evidence was led during the proceedings to show that the said handphones, P2, P3, P4 and P5 belonged to Poh Ken Hua. However the charge stated that the said handphones belonged to Fong Chew Phein. The facts made no mention in what way he or she is relevant to this case. D

[13] The statement of facts too disclosed two other characters namely, Lim Kim Lee and Teoh Lai Sieng who were said to be suspects that led the police to the accused shop. There, in the presence of the accused, the handphones, P2, P3, P4 and P5 were seized together with four purchase receipts in the name of Teoh Lai Sieng and one purchase receipt in the name of Lim Kim Lee. These facts were not shown how they were relevant to the charge under s 411 of the Penal Code against the accused. E F

[14] The third paragraph in the statement of facts is inconsistent with the charge against the accused under s 411 of the Penal Code. The fact reads, inter alia, on further investigation it was revealed that the accused 'telah mendapati melakukan kesalahan seperti dalam laporan pengadu'. Upon scrutiny of the complainant's report, it was about two male Chinese armed with a knife and robbed a cash of RM100, a lap top and a handset at shop, Soji Telekomunikasi owned by Poh Ken Hua. In other words, it was a case of an armed robbery, an offence under s 392 and s 397 of the Penal Code. By alleging that the accused had obliquely committed the offence of armed robbery, certainly his character was put in question. He was an armed robber, person of bad character. In the Supreme Court case of *Kiew Foo Mui & Ors v Public Prosecutor* [1995] 3 MLJ 505, in the course of a murder trial, the evidence that the appellants were seen fleeing from the scene of a crime in a *stolen station wagon* was admitted. Edgar Joseph FCJ said that this evidence — escaping in a stolen station wagon — could imply that the appellants were men of bad character and plainly inadmissible, though it was not objected to by the defence. The trial judge was duty bound to stop the prosecution from adducing it. G H I

[15] The allegation that the accused had committed the armed robbery was also not covered by the charge. No charge under s 392 and s 397 of the Penal Code was preferred against him. That being the case, such allegation was inadmissible, prejudicial against the accused and ought to be excluded, though not challenged by him. In the Court of Appeal case *Saludin bin Surif v Public Prosecutor* [1997] 3 MLJ 317, a prosecution witness, SP12 testified that to the effect that the appellant had smoked ganja in the premises and the appellant had previously supplied the witness SP12 with ganja. The trial judge admitted the evidence on the ground that there was no challenge by the defence. Shaik Daud JCA held that the evidence of SP12 was highly prejudicial and ought to be excluded. His Lordship went on to say:

> With respect, we hold that the learned judge erred in law on this issue, as it is trite law that inadmissible evidence remains inadmissible whether challenged or not. We hold that the testimony of SP12 in connection with the appellant was highly prejudicial and ought to be excluded. The general rule is that evidence showing that the accused had committed any other offence other than those charged with, or has a disposition to commit the kind of offence charged with, is inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he was charged with.

[16] I am aware that the evidence of bad character or the evidence that the accused had committed another offence which was not covered by the charge was held inadmissible and ought to be excluded in *Kiew Foo Mui & Ors'* case and *Saludin Surif'* case respectively. It is my considered view that the said principle is equally applicable to similar objectionable evidence being adduced in the statement of facts presented to the court after the accused pleaded guilty to the charge as in the instant case. Therefore, the allegation in the third paragraph of the statement of facts that the accused had committed the armed robbery should be excluded. The learned magistrate is duty bound to verify the facts of the case with the charge to ensure that the facts are supportive of the charge and having done so, to expunge all inadmissible, irrelevant and highly prejudicial evidence against the accused. The magistrate must carry out the task fairly, more so in this case, the accused was unrepresented — he had not had the services of counsel at the time he entered the plea of guilty at the court below.

[17] It is axiomatic that the statement of facts should be concise and unambigous. It should contained relevant facts which go to support the elements of the charge. The facts or evidence which are irrelevant, inadmissible and gravely prejudicial to the accused should be discarded. It is of fundamental importance to the administration of criminal justice that the accused should be given a fair trial or proceedings.

DECISION OF THIS COURT

[18] Even though the appeal was against sentence only, in the light of the

above affirmatives, I have decided to exercise my discretionary powers of revision under s 325 of the Criminal Procedure Code and set aside the plea of guilty of the accused, and substitute it with a plea of not guilty. The case is hereby remitted back to the Magistrate's Court (2) Alor Star for re-trial.

Plea of guilt set aside and case remitted back to magistrate's court for retrial.

Reported by Ashgar Ali Ali Mohamed